

24 MAY 1976

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18 Mar 76

MEMORANDUM FOR: Director of Central Intelligence

FROM:

Deputy to the DCI for the Intelligence Community

25X1

SUBJECT: Draft Legislation on Electronic Surveillance

1. The latest version of the draft legislation concerning electronic surveillance was obtained from the Attorney General's office on 18 May. It includes certain additions and deletions made by the Senate Judiciary Committee in their work on the bill. The Senate Committee has essentially completed work on the bill and it is expected to be sent to the floor of the Senate within the next three weeks.

2. The House Judiciary Committee is currently working on the bill, and their schedule for Committee action and floor vote is not yet fixed.

3. I asked the Office of General Counsel to review the changes made in the bill by the Senate Judiciary Committee. OGC reports, following this review, that none of the changes have substantive significance but only represent editorial changes and tightening of language. None of the changes affect areas on which the DCI or the OGC previously succeeded in modifying the draft bill.

4. A copy of the Senate bill with additions (underlined) and deletions (lined out) is attached hereto.

SIGNED

STAT

Attachment  
S. 3197

*MORNING MEET*

*Do we agree with this*

D/DCI/IC [ ] /hf 19 May 76

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*Justic*

94TH CONGRESS  
2D SESSION

## S. 3197

### IN THE SENATE OF THE UNITED STATES

MARCH 23, 1976

Mr. KENNEDY (for himself, Mr. NELSON, Mr. MATHIAS, Mr. HUGH SCOTT, Mr. McCLELLAN, Mr. HRUSKA, Mr. BAYH, and Mr. ROBERT C. BYRD) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

## A BILL

To amend title 18, United States Code, to authorize applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*  
3 That this Act may be cited as the "Foreign Intelligence Sur-  
4 veillance Act of 1976".

5 SEC. 2. Title 18, United States Code, is amended by

6 adding a new chapter after chapter 119 as follows:

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2

1 "Chapter 120.—ELECTRONIC SURVEILLANCE WITH-  
2 IN THE UNITED STATES FOR FOREIGN INTEL-  
3 LIGENCE PURPOSES

4 "§ 2521. Definitions

5 "(a) Except as otherwise provided in this section the  
6 definitions of section 2510 of this title shall apply to this  
7 chapter.

8 "(b) As used in this chapter—

9 "(1) 'Agent of a foreign power' means—

10 "(i) a person who is not a permanent resident  
11 alien or citizen of the United States and who is  
12 an officer or employee of a foreign power; or

13 "(ii) a person who, pursuant to the direction  
14 of a foreign power, is engaged in clandestine in-  
15 telligence activities, sabotage, or terrorist activities,

or who conspires with, assists or knowingly aids and or abets such a person in engaging in such activities.

"(2) 'Electronic surveillance' means --

"(i) the acquisition, by an electronic, mechanical, or other surveillance device, of the contents of a wire communication to or from a person in the United States, without the consent of any party thereto, where such acquisition occurs in the United States while the communication is being transmitted by wire;

"(ii) the acquisition, by an electronic, mechanical, or other surveillance device, of the contents of a radio transmission communication, without the consent of any party thereto, made with a reasonable expectation of privacy where both the point-of-origin sender and all intended recipients are located within the United States; or

"(iii) the installation of an electronic, mechanical or other surveillance device in the United States to acquire information not-transmitted-by other than from a wire communication or radio communication under circumstances in which a person has a reasonable expectation-of-privacy constitutionally protected right of privacy.

12 " (3) 'Foreign intelligence information' means--

13 " (i) information relating to the ability of the  
14 United States to protect itself against actual or  
15 potential attack or other hostile acts of a foreign  
16 power or its agents;

" (ii) information, with respect to foreign  
powers or territories, which because of its  
importance is deemed essential (a) to the  
security or national defense of the Nation  
or (b) to the conduct of the foreign affairs  
of the United States;

22 " (iii) information relating to the ability of the  
23 United States to protect the national security against  
24 foreign intelligence activities.

25 " (4) 'Attorney General' means the Attorney Gen-  
eral of the United States or in his absence the  
Acting Attorney General.

" (5) 'Foreign power' includes foreign govern-  
ments, factions of a foreign government, foreign  
parties, foreign military forces, or agencies or instru-  
mentalities of enterprises controlled by such entities,

or organizations, whether or  
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not recognized by the United States, or foreign-

8 "§ 2522. Authorization for electronic surveillance for for- 4-A  
9 eign intelligence purposes

10 "Applications for a court order under this chapter are  
11 authorized if the President has, by written authorization,  
12 empowered the Attorney General to approve applications to  
13 Federal judges having jurisdiction under section 2523 of  
14 this chapter, and a judge to whom an application is made  
15 may grant an order, in conformity with section 2525 of this  
16 chapter, approving electronic surveillance of a foreign power  
17 or an agent of a foreign power for the purpose of obtaining  
18 foreign intelligence information.

19 "§ 2523. Designation of judges authorized to grant orders  
20 for electronic surveillance

21 "(a) The Chief Justice of the United States shall desig-  
22 nate seven district court judges, each of whom shall have  
23 jurisdiction to hear applications for and grant orders approv-  
24 ing electronic surveillance anywhere within the United States  
25 under the procedures set forth in this chapter.

(b) The Chief Justice shall designate three judges, one of whom shall be designated as the presiding judge, from the United States district courts or courts of appeals who together shall

comprise a special court of appeals which shall have jurisdiction to hear an appeals by the United States from the denial of any application made under this chapter. The United States shall further have the right to appeal an affirmance of denial by that court to the Supreme Court. All appeals under this chapter shall be heard and determined as expeditiously as possible.

10       “(c) Applications made and orders granted under this  
11 chapter shall be sealed by the presiding judge and shall be  
12 kept under security measures established by the Chief Jus-  
13 tice in consultation with the Attorney General.

14       “§ 2524. Application for an order

15       “(a) Each application for an order approving electronic  
16 surveillance under this chapter shall be made in writing upon  
17 oath or affirmation to a judge having jurisdiction under sec-  
18 tion 2523 of this chapter. Each application must be approved  
19 by the Attorney General and shall include the following  
20 information:

21               “(1) the identity of the officer making the appli-  
22 cation;

23               “(2) the authority conferred on the applicant by

24       the President of the United States and the approval of  
25       the Attorney General to make the application.

1       “(3) the identity or a characterization of the per-  
2       son who is the subject of the electronic surveillance;

3       “(4) a statement of the facts and circumstances  
4       relied upon by the applicant to justify his belief that—

5       “(i) the target of the electronic surveillance  
6       is a foreign power or an agent of a foreign power;

7       and

8       “(ii) the facilities or the place at which the  
9       electronic surveillance is directed are being used, or  
10       are about to be used, by a foreign power or an  
11       agent of a foreign power;

12       “(5) a statement of the procedures by which the  
13       acquisition and retention of information relating to per-  
14       manent resident aliens or citizens of the United States  
15       that is not foreign intelligence information will be min-  
16       imized;



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"(6) a description of the type of information sought and a certification by the Assistant to the President for National Security Affairs or an executive branch official designated by the President from among those executive officers employed in the area of national security or defense and appointed by the President by and with the advice and consent of the Senate that such the information sought is foreign intelligence information, that the purpose of the surveillance is to obtain foreign intelligence information and that such information cannot feasibly be obtained by normal investigative techniques;

1       “(7) a statement of the means by which the surveil-  
2       lance will be effected;

3       “(8) a statement of the facts concerning all previous  
4       applications known to the Attorney General that have  
5       been made to any judge under this chapter involving any  
6       of the persons, facilities or places specified in the applica-  
7       tion, and the action taken on each previous application;  
8       and

9       “(9) a statement of the period of time for which the  
10       electronic surveillance is required to be maintained. If  
11       the nature of the intelligence gathering is such that the  
12       approval of the use of electronic surveillance under this  
13       chapter should not automatically terminate when the  
14       described type of information has first been obtained, a  
15       description of facts supporting the belief that additional  
16       information of the same type will be obtained thereafter.

17       “(b) The Attorney General may require any other affi-  
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"(c) at-the-time-of-the-hearing-on-the-application, the-applicant-may-furnish-to-the-judge-additional information-in-support-of-the-application-and The judge may require the applicant to furnish such other information or evidence as may be necessary to make the determinations required by section 2525 of this title.

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1 "§ 2525. Issuance of an order

2 " (a) Upon an application made pursuant to section  
3 2524 of this title, the judge shall enter an ex parte order  
4 as requested or as modified approving the electronic sur-  
5 veillance if he finds that—

6 " (1) the President has authorized the Attorney  
7 General to approve applications for electronic surveil-  
8 lance for foreign intelligence information;

9 " (2) the application has been approved by the  
10 Attorney General;

11 " (3) on the basis of the facts submitted by the  
12 applicant, there is probable cause to believe that:

13 " (i) the target of the electronic surveillance is  
14 a foreign power or an agent of a foreign power; and

15 " (ii) the facilities or place at which the elec-  
16 tronic surveillance is directed are being used, or  
17 are about to be used, by a foreign power or an  
18 agent of a foreign power;

19 " (4) minimization procedures to be followed are  
20 reasonably designed to minimize the acquisition and  
21 retention of information relating to permanent resident  
22 aliens or citizens of the United States that is not foreign  
23 intelligence information;

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25 2524 (a) (6) that the information sought is foreign in-

telligence information, that the purpose of this surveillance  
is to obtain such foreign intelligence information and that  
such information cannot feasibly be obtained by normal  
investigative techniques.

3       “(b) An order approving an electronic surveillance  
4 under this section shall—

5       “(1) specify—

6               “(i) the identity or a characterization of the  
7 person who is the subject of the electronic surveil-  
8 lance;

9               “(ii) the nature and location of the facilities  
10 or the place at which the electronic surveillance  
11 will be directed;

12               “(iii) the type of information sought to be  
13 acquired;

14               “(iv) the means by which the electronic sur-  
15veillance will be effected; and

16               “(v) the period of time during which the elec-  
17tronic surveillance is approved; and

18       “(2) direct—

19               “(i) that the minimization procedures be fol-  
20lowed;

"(ii) that, upon the request of the applicant, a specified communication or other common carrier, landlord, custodian, contractor, or other specified person furnish the applicant forthwith any and all information, facilities, or technical assistance, or other aid necessary to accomplish the electronic surveillance in such manner as will protect its secrecy and produce a minimum of interference with the services that such carrier, landlord, custodian, contractor, or other person is providing the target of electronic surveillance; and

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7. (iii) that the applicant compensate, at the  
8 prevailing rates, such carrier, landlord, custodian,  
9 or other person for furnishing such aid.

10 (c) An order issued under this section may approve  
11 an electronic surveillance for the period necessary to achieve  
12 its purpose, or for ninety days, whichever is less. Extensions  
13 of an order issued under this chapter may be granted upon  
14 an application for an extension made in the same manner as  
15 required for an original application and after findings re-  
16 quired by subsection (a) of this section. Each extension may  
17 be for the period necessary to achieve the purposes for which  
18 it is granted, or for ninety days, whichever is less.

19 (d) Notwithstanding any other provision of this  
20 chapter when the Attorney General reasonably determines  
21 that—

22 (1) an emergency situation exists with respect  
23 to the employment of electronic surveillance to obtain  
24 foreign intelligence information before an order au-

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1     thorizing such surveillance can with due diligence be  
2     obtained, and  
3     “(2) the factual basis for issuance of an order under  
4     this chapter to approve such surveillance exists,  
5     he may authorize the emergency employment of electronic  
6     surveillance if a judge designated pursuant to section 2523  
7     of this title is informed by the Attorney General or his design-  
8     ate at the time of such authorization that the decision has  
9     been made to employ emergency electronic surveillance .  
10    and if an application in accordance with this chapter is made  
11    to that judge as soon as practicable, but not more than  
12    twenty-four hours after the Attorney General authorizes  
13    such acquisition. In the absence of a judicial order approv-  
14    ing such electronic surveillance, the surveillance shall ter-  
15    minate when the information sought is obtained, when the  
16    application for the order is denied, or after the expiration  
17    of twenty-four hours from the time of authorization by the

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Attorney General, whichever is earliest. In the event that such application for approval is denied, or in any other case where the electronic surveillance is terminated without an order having been issued, no information obtained or derived from such surveillance shall be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in a federal or state court. As provided in section 2523, a denial of the application may be appealed by the Attorney General.

21     “(e) A judge denying an order under this section or  
22     a panel affirming such denial under section 2523 (b) shall  
23     state the reasons therefor.

1     “§ 2526. Use of information

2     “(a) Information acquired from an electronic surveil-  
3     lance conducted pursuant to this chapter may be used and  
4     disclosed by Federal officers and employees only for the

purposes designated under this chapter set forth in  
section 2521(b) (3) of this chapter or for the enforcement  
of the criminal law.



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"(b) The minimization procedures required under this chapter shall not preclude the retention and disclosure of information which is not nonforeign intelligence information acquired incidentally which is evidence of a crime.

11       ~~"(c) When information acquired from or the product~~  
12 ~~of an electronic surveillance conducted pursuant to this chap-~~  
13 ~~ter is received in evidence in any trial, proceeding, or other~~  
14 ~~hearing in any Federal or State court, the provisions of sec-~~  
15 ~~tion 2518 (9) of chapter 119 shall not apply. No otherwise~~  
16 ~~privileged communication obtained in accordance with, or~~  
17 ~~in violation of, the provisions of this chapter shall lose its~~  
18 ~~privileged character.~~

"(c) No information obtained or derived from an electronic surveillance shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a federal or state court unless, prior to the trial, hearing or other proceeding or at a reasonable time prior to an effort to disclose the information or submit it in evidence in the trial, hearing or other proceeding, the government notifies the court of the source of the information and the court, in camera and ex parte, determines that the surveillance was conducted in a manner that did not violate any right afforded the person by the Constitution and statutes of the United States.

19     “(d) If an emergency employment of electronic surveil-  
20     lance is authorized under section 2525 (a) and a subsequent  
21     order approving the surveillance is not obtained, the judge  
22     shall cause to be served on any United States citizen or  
23     permanent resident alien named in the application and on  
24     such other United States citizen or permanent resident alien  
25     subject to electronic surveillance as the judge may determine

17

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1 in his discretion it is in the interest of justice to serve, notice  
2 of—

3 “(1) the fact of the application;

4 “(2) the period of the surveillance; and

5 “(3) the fact that during the period information  
6 was or was not obtained.

7 On an ex parte showing of good cause to the judge the  
8 serving of the notice required by this subsection may be  
9 postponed or suspended for a period not to exceed ninety  
10 days. Thereafter, on a further ex parte showing of good  
11 cause, the court shall forgo ordering the serving of the  
12 notice required under this subsection.

13 “§ 2527. Report of electronic surveillance

14 “In April of each year, the Attorney General shall  
15 report to the Administrative Office of the United States  
16 Courts and shall transmit to the Congress with respect to the  
17 preceding calendar year—

18 “(1) the number of applications made for orders  
19 and extensions of orders approving electronic surveil-  
20 lance and the number of such orders and extensions  
21 granted, modified, and denied;

22 “(2) the periods of time for which applications  
23 granted authorized electronic surveillances and the actual

24 duration of such electronic surveillances;

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1       “(3) the number of such surveillances in place  
2       at any time during the preceding year; and

3       “(4) the number of such surveillances terminated  
4       during the preceding year.

5       “§ 2528. Presidential power;

6       ~~“Nothing contained in this chapter shall limit the con-  
7       stitutional power of the President to order electronic surveil-  
8       lance for the reasons stated in section 2511 (3) of title 18,  
9       United States Code, if the facts and circumstances giving  
10      rise to such order are beyond the scope of this chapter.”~~

Nothing contained in chapter 119, section 605 of  
the Communications Act of 1934, or this chapter shall be  
deemed to affect the exercise of any constitutional power  
the President may have to acquire foreign intelligence  
information if

(a) such acquisition does not come within the  
definition of electronic surveillance in paragraph (2)  
of subsection (b) of section 2521 of this chapter, or  
(b) the facts and circumstances giving rise to the  
acquisition are so unprecedented and potentially harmful  
to the nation that they cannot be reasonably said to  
have been within the contemplation of Congress in

Foreign intelligence information acquired by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial, hearing, or other proceeding only where such acquisition was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

Sec. 3. The provisions of this Act and the amendment made hereby shall become effective upon enactment; provided that, any electronic surveillance approved by the Attorney General to gather foreign intelligence information shall not be deemed unlawful for failure to follow the procedures of chapter 120, title 18, United States Code, if that surveillance is terminated or an order approving the surveillance is obtained under this chapter within sixty days following the designation of all judges pursuant to section 2523 of chapter 120, title 18, United States Code.

Sec. 4. Chapter 119 of title 18, United States Code, is amended as follows:

(a) Section 2511(1) is amended by inserting the words "or chapter 120" after the word "chapter."

(b) Section 2511(2)(a)(ii) is amended by inserting the words "or chapter 120" after the word "chapter;" and by adding at the end of the section the following provision:

"provided, however, that before the information, facilities or technical assistance may be provided, the investigative or law enforcement officer shall furnish to the officer, employee or agent of the carrier either --

(1) a statement signed by the authorizing judge certifying that a court order directing such assistance has been issued, or

(2) in the case of an emergency surveillance as provided for in section 2518(7) or section 2525(d) of chapter 120, a sworn statement by the investigative or law enforcement officer certifying that the applicable statutory requirements have been met,

and setting forth the period of time for which the surveillance is authorized and describing the facilities from which the communication is to be intercepted. Any violation of this subsection by a communication common carrier or an officer, employee or agent thereof, shall render the carrier liable for the civil damages provided for in section 2520.

(c) Section 2511(3) is repealed.

(d) Section 2514 is amended by inserting the words "or chapter 120" after both appearances of the word "chapter."

(e) Section 2515 is amended by adding at the end of the section the words "or chapter 120."

(f) Section 2518(1) is amended by inserting "under this chapter" after the word "communication."

(g) Section 2518(4) is amended by inserting the words "under this chapter" after both appearances of the words "wire or oral communication."

(h) Section 2518(9) is amended by striking the word "intercepted and inserting the words "intercepted pursuant to this chapter" after the word "communication."

(i) Section 2518(10) is amended by striking the word "intercepted" and inserting the words "intercepted pursuant to this chapter" after the first appearance of the word "communication."

(j) Section 2519(3) is amended by inserting the words "pursuant to this chapter" after the words "wire or oral communications" and after the words "granted or denied."

(k) Section 2520 is amended by

(1) inserting the words, "other than an agent of a foreign power as defined in section 2521(b)(1)(i) of Chapter 120" after the first appearance of the word "person;"

(2) inserting the words "chapter 120" after  
the word chapter; and

(3) deleting the word "or" after the words  
"court order" and inserting in lieu thereof a comma  
and inserting the words "or other lawful authority"  
after the word "authorization."



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